A

Public Prosecutor v Chang Kok Foo

B HIGH COURT (PENANG) — CRIMINAL TRIAL NO 45A-20–07 OF 2014
COLLIN SEQUERAH JC
8 JULY 2015

C *Criminal Law — Dangerous Drugs Act 1952 — s 37(da) — Trafficking — Accused found in unlocked room — Body search revealed nothing incriminating — Drugs found in hollow of dressing room chair — Whether accused had knowledge of drugs — Whether sufficient to establish possession or control — Whether anyone else had access to room — Whether there was exclusivity of possession — Whether prosecution's case proved beyond reasonable doubt*

D

E A raiding party comprising police from the Narcotics Operations was conducted on a house. The police had to cut open the padlock to the front gate in order to enter. The circumstances under which the police gained entry according to the prosecution narrative was adduced to suggest forced entry into the premises. The evidence also revealed that no keys to the padlocks were found or produced. The police report lodged in respect of the raid were also

F strangely silent as to the fact of forced entry. No photographs were produced to show any evidence of forced entry into the premises. Upon entry into the premises, the police found the accused lying down on a bed situated in the room. The door to this room was not locked. A body search conducted on the accused revealed nothing incriminating. A search was conducted in the room

G and drugs were found in the hollow of the dressing room chair 'kerusi meja solek'. The drugs were not visible to anyone who had entered in the room. According to evidence led by the prosecution, upon the recovery of the drugs and upon his arrest, the accused's reaction was worried, 'cemas' and restless, 'gelisah'. A search conducted in the room also revealed a passport in the name

H of the accused, a CIMB and Bank of Commerce bankbook in the accused's name. The accused was charged with two charges, namely trafficking in 375.3g of methamphetamine, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952; and being in possession of 12.2g of heroin and monoacetylmorphines, an offence under s 12(2) of the Act.

I

Held, acquitting and discharging the accused without calling for his defence on both charges:

(1) The drugs were found in the hollow of the dressing table chair and therefore it was not visible to anyone who was in the room. Although

clothing was seized from the room, no clothes fitting exercise was carried out to see if it fitted the accused. No keys to the padlock were found on the accused. For that matter, no keys to the room were recovered. A wedding photograph was found in the room and adduced to court to show that the accused was occupying the room with his wife. However, no documentary or oral evidence was adduced to show who was the registered owner of the house and neither was there any evidence produced to show who was the tenant or subtenant, if any (see para 32).

(2) Even if the accused had known the presence of the drugs in the hollow of the dressing table chair, this would have been insufficient to establish that he was in possession or in control of it, given that his wife and daughter also had unrestricted access to the room. The possibility that either one of them had concealed the drugs there could not be excluded. The prosecution failed to prove that there was exclusivity of possession on the part of the accused and that he had power of disposal over the impugned drugs to the exclusion of others. The prosecution also failed to adduce any fingerprint evidence or DNA evidence to link the accused to the drugs (see paras 61 & 63).

(3) Under s 8 of the Evidence Act 1950, the conduct of an accused ie absconding, nervousness, restlessness and other like behaviour is admissible as a relevant fact. Under s 9, facts which support or rebut an inference suggested by such conduct is relevant. The evidence that the accused was worried 'cemas' and restless, 'gelisah' was conduct of an equivocal nature at best. Any reasonable person upon realising that incriminating evidence or objects were discovered are naturally inclined to display similar reaction what more when his arrest immediately followed such discovery. The reaction displayed by the accused was equally consistent with that of a person who had just discovered that incriminating articles were present in the very room he was found in. In all the circumstances of this case, it was unsafe to conclude that such reaction constituted evidence of knowledge on the part of the accused that there were drugs in the dressing table chair (see paras 36–37).

(4) Mere proximity or juxtaposition of the accused to the drugs without more was insufficient to fasten possession upon the accused. In the circumstances, the prosecution failed to prove that the accused had knowledge of the drugs found in the room and failed to prove that the accused was in possession of the said drugs (see para 66).

(5) In order for the prosecution to invoke the presumption under s 37(da), an affirmative finding of possession must first have been made out. As this had not been the case here as evident from what was earlier held, the prosecution had thus failed to successfully rely upon the statutory presumption in s 37(da). The prosecution failed to establish a prima facie case in respect of both charges against the accused (see paras 69 & 71).

[Bahasa Malaysia summary

Sepasukan polis daripada Operasi Narkotik telah menjalankan serbuan ke atas sebuah rumah. Pihak polis terpaksa memotong mangga di pintu depan untuk masuk. Keadaan di mana polis dapat memasuki mengikut naratif pendakwaan yang dikemukakan, mencadangkan pecah masuk ke dalam premis tersebut. Keterangan tersebut juga mendedahkan bahawa tiada kunci kepada mangga dijumpai atau dikemukakan. Laporan polis yang dibuat berkenaan dengan serbuan itu juga dengan anehnya mendiamkan fakta berhubung pecah masuk. Tiada gambar dikemukakan untuk menunjukkan apa-apa bukti pecah masuk ke dalam premis tersebut. Selepas memasuki premis, polis mendapati tertuduh berbaring di atas katil yang berada di dalam bilik. Pintu kepada bilik ini tidak berkunci. Satu carian badan dijalankan ke atas tertuduh mendedahkan tiada apa-apa yang menyabitkan. Carian telah dijalankan di dalam bilik tersebut dan dadah ditemui dalam rongga kerusi bilik persalinan, 'kerusi meja solek'. Dadah tersebut tidak boleh dilihat oleh sesiapa sahaja yang memasuki bilik itu. Menurut keterangan yang diketuai oleh pihak pendakwaan, selepas menemui dadah dan semasa dia ditangkap, reaksi tertuduh ialah atas pemulihan dadah dan apabila dia ditangkap, reaksi tertuduh bimbang, cemas dan resah, gelisah. Satu carian yang dijalankan di dalam bilik juga mendedahkan pasport di atas nama tertuduh, buku bank CIMB dan Bank of Commerce atas nama tertuduh. Tertuduh didakwa dengan dua pertuduhan iaitu mengedar 375.3g methamphetamine, suatu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952; dan memiliki 12.2g heroin dan monoacetylmorphines, suatu kesalahan di bawah s 12(2) Akta tersebut.

Diputuskan, membebaskan dan melepaskan tertuduh tanpa memanggilnya untuk membela diri ke atas kedua-dua pertuduhan:

(1) Dadah tersebut dijumpai di dalam rongga kerusi meja solek dan oleh itu ia tidak boleh dilihat oleh sesiapa yang berada di dalam bilik. Walaupun pakaian disita daripada bilik tersebut, tiada ujian pemakaian pakaian dijalankan untuk melihat sama ada pakaian tersebut padan dengan tertuduh. Tiada kunci kepada mangga ditemui pada tertuduh. Dalam hal ini, tiada kunci kepada bilik yang ditemui. Satu gambar perkahwinan ditemui di dalam bilik dan dikemukakan ke mahkamah untuk menunjukkan bahawa tertuduh berkongsi bilik dengan isterinya. Walau bagaimanapun, tiada dokumen atau bukti lisan yang dikemukakan untuk menunjukkan siapa pemilik berdaftar rumah tersebut dan tidak ada apa-apa keterangan yang dikemukakan untuk menunjukkan siapa penyewa atau penyewa kecil, jika ada (lihat perenggan 32).

(2) Walaupun sekiranya tertuduh telah mengetahui keberadaan dadah dalam rongga kerusi meja solek, ini tidak mencukupi untuk membuktikan bahawa dia memiliki atau mengawal dadah tersebut, memandangkan isteri dan anak perempuannya juga mempunyai akses

yang tidak terhad kepada bilik tersebut. Kemungkinan bahawa salah seorang daripada mereka menyembunyikan dadah tidak boleh dikecualikan. Pihak pendakwaan gagal membuktikan bahawa terdapat milikan eksklusif di pihak tertuduh dan bahawa dia mempunyai kuasa pelupusan ke atas dadah yang dipersoalkan tidak termasuk yang lain. Pihak pendakwaan juga gagal mengemukakan apa-apa bukti cap jari atau keterangan DNA untuk mengaitkan tertuduh kepada dadah tersebut (lihat perenggan 61 & 63).

(3) Di bawah s 8 Akta Keterangan 1950, kelakuan tertuduh iaitu menghilangkan diri, ketakutan, keresahan dan tingkah laku lainnya boleh diterima sebagai satu fakta berkaitan. Di bawah s 9, fakta yang menyokong atau mematahkan sesuatu kesimpulan yang dibayangkan oleh kelakuan sedemikian adalah berkaitan. Keterangan bahawa tertuduh bimbang cemas dan resah, gelisah adalah kelakuan yang bersifat samar-samar pada tahap terbaik. Mana-mana orang yang munasabah apabila menyedari keterangan yang menuduh atau objek ditemui secara semula jadi cenderung untuk memaparkan reaksi yang sama apatah lagi apabila dia segera ditangkap diikuti dengan penemuan tersebut. Reaksi yang dipamerkan oleh tertuduh adalah sama dan konsisten dengan seseorang yang baru sahaja mendapati bahawa benda yang dibabitkan ada di dalam bilik di mana dia didapati. Dalam semua keadaan kes ini, adalah tidak wajar untuk membuat kesimpulan bahawa tindak balas tersebut merupakan bukti pengetahuan di pihak tertuduh bahawa terdapat dadah dalam kerusi meja solek (lihat perenggan 36–37).

(4) Hanya berdekatan atau pengaturan seiring tertuduh kepada dadah tidak melebihi dan tidak mencukupi untuk mengikat pemilikan ke atas tertuduh. Dalam keadaan ini, pihak pendakwaan gagal membuktikan bahawa tertuduh mengetahui tentang dadah yang ditemui dalam bilik dan gagal membuktikan bahawa tertuduh memiliki dadah tersebut (lihat perenggan 66).

(5) Dalam usaha bagi pihak pendakwaan untuk menggunakan anggapan di bawah s 37(da), dapatan pengesahan milikan perlu dibuktikan. Memandangkan ini bukanlah kes di sini seperti yang terbukti daripada apa yang diputuskan sebelumnya, pihak pendakwaan dengan itu telah gagal untuk bergantung dengan jayanya kepada anggapan statutori dalam s 37(da). Pihak pendakwaan gagal untuk membuktikan kes prima facie bagi kedua-dua pertuduhan terhadap tertuduh (lihat perenggan 69 & 71).]

Notes

For a case on s 37(da), see 4(1) *Mallal's Digest* (5th Ed, 2015) para 989.

Cases referred to

Abdullah Zawawi bin Yusoff v PP [1993] 3 MLJ 1; [1993] 4 CLJ 1, SC (refd)
Azizan bin Yahaya v PP [2013] 1 MLJ 180; [2012] 8 CLJ 405, CA (refd)
Balachandran v PP [2005] 2 MLJ 301; [2005] 1 CLJ 85, FC (refd)
Chan Pean Leon v PP [1956] 1 MLJ 237 (refd)
DA Duncan v PP [1980] 2 MLJ 195 (refd)
Gooi Loo Seng v PP [1993] 2 MLJ 137, SC (refd)
Husin bin Sitorus v PP [2012] 3 MLJ 782; [2012] 7 CLJ 205, CA (refd)
Ibrahim Mohamad & Anor v PP [2011] MLJU 1491; [2011] 4 CLJ 113, FC (refd)
Khoo Hi Chiang v PP and another appeal [1994] 1 MLJ 265, SC (refd)
Law Sie Hoe v PP [2014] 6 MLJ 714; [2014] 1 LNS 269, CA (refd)
Leow Nghee Lim v Reg [1956] 1 MLJ 28 (refd)
Looi Kow Chai & Anor v PP [2003] 2 MLJ 65; [2003] 2 AMR 89, CA (folld)
Muhammed bin Hassan v PP [1998] 2 MLJ 273, FC (refd)
Munusamy v PP [1987] 1 MLJ 492; [1987] CLJ (Rep) 221, SC (refd)
Parlan bin Dadeh v PP [2008] 6 MLJ 19, FC (refd)
PP v Abdul Rahman bin Akif [2007] 5 MLJ 1, FC (refd)
PP v Dato' Seri Anwar bin Ibrahim (No 3) [1999] 2 MLJ 1; [1999] 2 AMR 2017, HC (refd)
PP v Denish a/l Madhavan [2009] 2 MLJ 194, FC (refd)
PP v Lee Jun Ho & Ors [2009] 3 MLJ 400, HC (refd)
PP v Lim Bong Kat & Anor [1992] 4 CLJ 2173, HC (refd)
PP v Lin Lian Chen [1992] 2 MLJ 561, SC (refd)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393; [2005] 6 AMR 203, FC (refd)
PP v Muhamad Nasir bin Shaharuddin & Anor [1994] 2 MLJ 576, HC (refd)
Romi Amora bin Amir v PP [2011] 4 MLJ 571, CA (refd)
Siew Yoke Keong v PP [2013] 3 MLJ 630, FC (refd)
Toh Ah Loh and Mak Thim v Rex [1949] 1 MLJ 54 (refd)

Legislation referred to

Criminal Procedure Code ss 112, 118, 180(1)
Evidence Act 1950 ss 8, 9, 27, 32(1), 32(1)(i)
Dangerous Drugs Act 1952 ss 37(d), 37(da), 37(da)(xvi), 37A, First Schedule

Dharliza bt Dris (Deputy Public Prosecutor, Penang Legal Advisor Office) for the plaintiff.
Ranjit Singh Dhillon (J Kaur Ranjit & Co) for the defendant.

Collin Sequerah JC:

THE CHARGES AGAINST THE ACCUSED

[1] The accused above named was charged with two charges as follows:

First Charge (translated from Bahasa Malaysia):

That you on 31st July 2013 at around 5.00pm at address 1060 F, Jalan Sultan Azlan Shah, Sungai Nibong 1190 Bayan Lepas, Pulau Pinang in the Southwest District (Daerah Barat Daya) in the state of Pulau Pinang did traffic in dangerous drugs of the type Methamphetamine weighing 375.3 grams and you have thereby committed an offence under section 39B(1)(a) Dangerous Drugs Act 1952 and punishable under section 39B(2) of the same Act.

Second Charge (as amended) (translated from Bahasa Malaysia):

That you on 31st July 2013 at around 5.00 pm at address 1060 F Jalan Sultan Azlan Shah, Sungai Nibong 1190 Bayan Lepas, Pulau Pinang in the Southwest District (Daerah Barat Daya) in the state of Pulau Pinang was found in possession of dangerous drugs of the type Heroin and Monoacetylmorphines weighing 12.2 grams and you have thereby committed an offence under section 12(2) Dangerous Drugs Act 1952 and punishable under section 39A(2) of the same Act.

[2] After both charges were read out, the accused pleaded not guilty and claimed trial.

SALIENT FACTS AS LED BY THE PROSECUTION WITNESSES

[3] Prosecution witness ('PW4') on 31 July 2013, based on information received, headed a raiding party comprising police from the Narcotics Operations at the Narcotics Criminal Investigation Department (Bahagian Siasatan Jenayah Narkotik) at Ibu Pejabat Kontinjen (IPK) (Police Headquarters) Pulau Pinang. The raid was conducted on a house located at No 1060 F, Jalan Sultan Azlan Shah, Sungai Nibong 11900 Bayan Lepas, Pulau Pinang (the place of incident).

[4] The raiding party arrived at the place of incident at approximately 5pm that day. PW4 conducted an observation of the place of incident for about 15 minutes. The place of incident was a village (*kampung*) house with two gates (*pintu pagar*), one smaller gate facing Hotel B Suite and another larger gate in the front of the house that faced toward the direction of a road. PW4 in his testimony said that both the gates were locked and he saw movement of persons in the vicinity of the house. PW4 then instructed a member of his raiding party, one Detective Sergeant Shanmugam to guard the front gate while PW4 together with Corp Tee, Corp Ramesh and Corp Fadlan stood guard at the small gate. According to PW4, the small gate was locked and he instructed Corp Tee to cut the padlock. After the padlock was cut, PW4 saw a male

Chinese standing outside the house in front of a fish pond and in front of a table. After introducing himself, PW4 conducted a physical search upon the male Chinese and recovered a small plastic packet containing crystal like substances from his hand. The male Chinese who was identified as Tan Hock Lye was then arrested.

[5] After that, PW4 instructed the said Tan Hock Lye to open the front grill to the house but he informed PW4 that he did not have the key. PW4 then instructed Corp Tee to cut open the padlock to the gate. Upon entering inside the house, which was in an unkempt and messy condition, a male Chinese was discovered lying down on a bed in the second room, hereinafter 'the room', on the left side of the house. The door to this room was ajar. A physical search conducted on the male Chinese did not reveal anything incriminating. This male Chinese was later identified as the accused. PW4 conducted a search inside the room and recovered substances suspected to be dangerous drugs from inside a dressing table chair which was located next to a clothes cupboard.

[6] The drugs recovered from the dressing table chair by PW4 were as follows:

(a) one transparent plastic packet with the words 'GUANYINWANG' marked 'S1' (exh P16) containing three transparent plastic packets containing lumps (*ketulan*) and powdery crystals suspected to be *syabu* marked 'S2, S3 and S4' (exhs P17, P17(a), P17(b), P18, P18(a), P18(b), P19, P19(a) and P19(b)) respectively;

(b) one green plastic packet marked 'S5' (exh P20) containing two transparent plastic packets containing lumps (ketulan) suspected to be heroin marked 'S6 and S7' (exhs P21, P21(a), P21(b), P22, P22(a), P22(b)), three transparent plastic packets containing a white powdery substance suspected to be heroin marked 'S8, S9, S10' (exh P23, P23(a), P24, P24(a), P24(b), P25, P25(a)) and ten transparent plastic packets bound by a rubber band containing lumps (*ketulan*) suspected to be heroin marked 'S11(1) until S11(10)' (exh P27 (1–10), P27(b), P27(c));

(c) one plastic bottle with cover containing a black coloured liquid suspected to be drugs marked 'S12' (exh P28);

(d) one box with cover on which was written the words 'Ser Jacopo Dalla Gemma' containing empty plastic bags marked 'S13' (exh P32, P32(a));

(e) two weighing scales marked 'S15 and S16' (exh P33(a), P33(b));

(f) one sealer marked 'S17' (exh P34); and

(g) one transparent plastic packet marked 'S14' containing three measuring spoons and two empty straws marked 'S14' (1–5) exh P35, P35(a–c) and P36(d–e)).

[7] PW4 conducted a further search in the said room and recovered a passport in the name of Chang Kok Foo (the accused), one CIMB bank book in the name of the accused and one Bank of Commerce bank book also in the name of the accused. PW4 also seized the NRIC of both the accused and the said Tan Hock Lye, the two padlocks which had been cut, one electric bill and one dressing table chair. PW4 testified that the accused and all the exhibits were brought to the South West District Police Headquarters (Ibu Pejabat Polis Daerah, Barat Daya) at around 9pm where he lodged Bayan Baru Police Report 003463/13, made a search list and acknowledgment of hand over of exhibits list. PW4 further placed markings and his signature and the date of the incident ie 31 July 2013 on all the exhibits. PW4 testified that at all material times until he handed over the accused and the exhibits to the investigating officer Inspector Suhaimi bin Mat, PW5, the exhibits were constantly in his custody and control.

[8] PW5 testified that after he received the exhibits he placed markings on all the exhibits. PW5 also weighed the exhibits in the presence of PW4. PW5 then kept all the exhibits in a cabinet under lock and key at the Narcotics Department (Pejabat Narkotik IPD Barat Daya) strong room. The keys to the cabinet were in the possession of PW5 at all times.

[9] On 1 August 2013 at around 3pm PW4, PW5 and PW2 went to the place of incident where they took ten photographs of the place of incident. PW5 also seized a wedding photograph of the accused and his wife from the room. On the same day at around 9pm, PW5 took the exhibits out from the cabinet and instructed PW2 to take 13 photographs of the exhibits. The exhibits were thereafter placed back in the cabinet in the said strong room at the Narcotics Department (Pejabat Narkotik IPD Barat Daya) after that.

[10] On 2 August 2013 at around 2.59pm, PW5 assisted by Constable 17213 Aizat sent all the exhibits in a box marked 'SK' to the chemist, En Radwan bin Mail, PW3, at the chemist department. PW3 handed over a receipt from the chemist department (exh P15) to PW5. On 14 April 2014 at around 3pm, PW5 received back the box labelled 'SK' containing all the exhibits which were affixed with safety labels from the Chemist Department (Jabatan Kimia Malaysia). PW3 also handed over a chemist report dated 14 April 2014 with laboratory No 13-FR-P-02399 (exh P29).

[11] The results of the analysis conducted by the chemist revealed that the exhibits seized were dangerous drugs of the type methamphetamine weighing 375.3g and heroin and monoacetylmorphines weighing 12.2g as listed under the First Schedule to the Dangerous Drugs Act 1952.

DUTY OF THE COURT AT THE END OF THE PROSECUTION CASE

[12] Section 180(1) of the Criminal Procedure Code stipulates the duty of the court at the end of the prosecution case. It reads as follows:

> 180 Procedure after conclusion of case for prosecution
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> (1) When the case for the prosecution is concluded, the Court shall consider whether the prosecution has made out a prima facie case against the accused.
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> (2) If the Court finds that the prosecution has not made out a prima facie case against the accused, the Court shall record an order of acquittal.
>
> (3) If the Court finds that a prima facie case has been made out against the accused on the offence charged the Court shall call upon the accused to enter on his defence.
>
> (4) For the purpose of this section, a prima facie case is made out against the accused where the prosecution has adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction.

[13] The duty upon the court at that stage has also been the subject of judicial consideration in the cases of *Public Prosecutor v Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1; [1999] 2 AMR 2017, *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65; [2003] 2 AMR 89, *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85 and *Public Prosecutor v Mohd Radzi Bin Abu Bakar* [2005] 6 MLJ 393; [2005] 6 AMR 203 respectively. They are all united in the stand that they take, and that is that the evidence at the close of the case for the prosecution must be subjected to maximum evaluation in order to determine whether a prima facie case is made out that would justify a court in calling for the defence of the accused. The phrase 'prima facie case' itself has not been statutorily defined in the above section. However, it has been the subject of judicial pronouncement. In the case of *Dato' Seri Anwar bin Ibrahim*, His Lordship Augustine Paul J (as he then was) had this to say on the meaning of the phrase 'prima facie case':

> The meaning of prima facie case in s 180(1) of the Criminal Procedure Code must be understood in the context of a non-jury trial. A prima facie case arises where the evidence in favour of a party is sufficiently strong for the opposing party to be called on to answer. The evidence adduced must be such that it can be overthrown only by rebutting evidence by the other side. Taken in its totality, the force of the evidence must be such that, if unrebutted, it is sufficient to induce the court to believe in the

existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts existed or did happen. As this exercise cannot be postponed to the end of the trial a maximum evaluation of the credibility of the witnesses must be done at the close of the case against the prosecution before the court can rule that a prima facie case has been made out in order to call for defence. Be that as it may, I am unable to agree with the defence submission that this means that the prosecution must prove its case beyond reasonable doubt at that stage. A case is said to have been proven beyond a reasonable doubt only upon a consideration and assessment of all the evidence (see *Canadian Criminal Evidence* (3rd Ed) … thus, a prima facie case as prescribed by the new s 180(1) of the Criminal Procedure Code must mean a case which if unrebutted would warrant a conviction.

[14] In *Looi Kow Chai v Public Prosecutor* [2003] 2 MLJ 65, Gopal Sri Ram JCA (as he then was) speaking for the Court of Appeal had this to say:

In our respectful view, the correct test to be applied in determining whether a prima facie case has been made out under s 180 of the CPC (and this would apply to a trial under s 173 of the CPC) is that as encapsulated in the judgment of Hashim Yeop Sani FJ (as he then was) in *Dato' Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232 at p 270:

To summarise, it would therefore appear that having regard to the prosecution evidence adduced so far, a prima facie case has not been established against Nordin Johan and Aziz Abdullah, the second accused and the fourth accused which, failing their rebuttal, would warrant their conviction. In other words if they elect to remain silent now (which I hold they are perfectly entitled to do even though they are being tried under the Emergency Regulations) the question is can they be convicted of the offence of s 302 read with s 34 of the Penal Code? My answer to the question is in the negative.

We are confident in the view we have just expressed because we find nothing in the amended s 180(1) of the CPC that has taken away the right of an accused person to remain silent at the close of the prosecution case. Further we find nothing in the legislative intention of Parliament as expressed in the language employed by it to show that there should be a dual exercise by a judge under s 180 *when an accused elects to remain silent as happened in Pavone v Public Prosecutor* [1984] 1 MLJ 77. In other words we are unable to discover anything in the language of the recently formulated s 180 that requires a judge sitting alone first to make a minimum evaluation and then when the accused elects to remain silent to make a maximum evaluation in deciding whether to convict or not at the close of the prosecution case.

It therefore follows that there is only one exercise that a judge sitting alone under s 180 of the CPC *has to undertake at the close of the prosecution case. He must subject the prosecution evidence to maximum evaluation and to ask himself the question: if I decide to call upon the accused to enter his defence and he elects to remain silent, am I prepared to convict him on the totality of the evidence contained in the prosecution case? If the answer is in the negative then no prima facie case has been made out and the accused would be entitled to an acquittal.* (Emphasis added.)

[15] It is therefore evident that the expected standard to which a trial court should hold the prosecution to is that of a maximum evaluation of the evidence of all their witnesses. This exercise necessarily involves the court in subjecting all the evidence of the prosecution witnesses to strict curial scrutiny. The credibility of the testimony of all the witnesses for the prosecution must be scrutinised and evaluated with a fine toothcomb. Should more than one inference arise as a result of this exercise, the one favourable to the accused must be adopted. The analysis of the evidence led by the prosecution proceeded with the foregoing principles in mind.

ANALYSIS OF THE PROSECUTION CASE

Ingredients of the offence of trafficking

[16] In order for the prosecution to make out a prima facie case in respect of the charges against the accused, it is incumbent on them to prove the following ingredients. Firstly, that the drugs are dangerous drugs within the meaning and definition of the Dangerous Drugs Act 1952 ('the DDA'). Secondly, that the accused was in possession of the impugned drugs. Thirdly, that the accused was trafficking in the drugs.

The drugs are dangerous drugs within the meaning and definition of the DDA

[17] The prosecution called the chemist, SP3, who testified that the analysis conducted on the drugs found revealed dangerous drugs of the type methamphetamine weighing 375.3g and heroin and monoacetylmorphines weighing 12.2g respectively as listed in the First Schedule to the DDA.

[18] The Federal Court case of *Munusamy v PP* [1987] 1 MLJ 492; [1987] CLJ (Rep) 221 held as follows:

> We are therefore of the view, that in this type of cases where the opinion of the chemist is confined only to the elementary nature and identity of the substance, the Court is entitled to accept the opinion of the expert of its face value, unless it is inherently incredible or the defence calls evidence in rebuttal by another expert to contradict the opinion. So long as some credible evidence is given by the chemist to support his opinion, there is no necessity for him to go into the details of what he did in the laboratory, step by step.

[19] See also *Khoo Hi Chiang v Public Prosecutor and another appeal* [1994] 1 MLJ 265 where it was held, inter alia, that the court is entitled to accept the opinion of the expert at its face value.

[20] The court finds that the evidence of PW3 was not inherently incredible. In the circumstances of the case and guided by the authorities referred to, the

court finds that the prosecution had proven that the drugs seized were of the type, nature and weights as testified to by PW3 and as confirmed in the chemist report Laboratory Number 13-FR-P-02399.

The accused was in possession of the said drugs

[21] The thrust of the submission by the prosecution was that there was sufficient evidence adduced to prove custody, control, knowledge and possession on the part of the accused. The tenor of their submissions also made it clear that they were not seeking to rely on presumed possession under s 37(d) of the DDA but were out to prove actual possession on the part of the accused. It is for that reason also that in their submissions they placed reliance upon the statutory presumption under s 37(da) of the DDA in respect of the trafficking charge, the option of invoking the double presumption not being open to them for reasons that will surface later in the judgment.

[22] In a charge of trafficking in dangerous drugs, possession is the most important ingredient. Unless there is direct evidence of trafficking, it is a necessary step towards proving trafficking. The prosecution can prove 'possession' either by direct evidence or employing in aid the presumption under s 37(d) of the Dangerous Drugs Act 1952 ('the DDA').

[23] In relation to proof of direct possession, the law was taken to be settled as early as 1949 that possession in order to incriminate a person, must have the following characteristics:

(a) the possessor must know the nature of the thing possessed;

(b) he must have a power of disposal over it; and

(c) he must be conscious of his possession of the thing.

[24] See *Toh Ah Loh and Mak Thim v Rex* [1949] 1 MLJ 54.

[25] In *Leow Nghee Lim v Reg* [1956] 1 MLJ 28 Taylor J explained 'possession' as follows:

> The word 'possession' is a vague and general word which cannot be closely defined. *Without at least general knowledge there cannot be possession but there can be possession without full and exact knowledge.* This is recognised in the present Drugs Ordinance which provides, by the presumption already cited, that if a man has custody or control of a drug the onus of proving, first that he did not have possession, and secondly that he did not know the nature of the drug, shall be shifted to him. (Emphasis added.)

[26] In *Chan Pean Leon v Public Prosecutor* [1956] 1 MLJ 237, Thompson J

said:

> ... 'possession' itself as regards the criminal law is described as follows in *Stephen's Digest* (9th Ed p 304):
>
> *A moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need.*
>
> To put it otherwise, there is a physical element and a mental element which must both be present before possession is made out. The accused must not only be so situated that he can deal with the thing as if it belonged to him, for example have it in his pocket or have it lying in front of him on a table. *It must also be shown that he had the intention of dealing with it as if it belonged to him should he see any occasion to do so, in other words, that he had some animus possidendi. Intention is a matter of fact which in the nature of things cannot be proved by direct evidence. It can only be proved by inference from the surrounding circumstances*. Whether these surrounding circumstances make out such intention is a question of fact in each individual case. If a watch is in my pocket then in the absence of anything else the inference will be clear that I intend to deal with it as if it were my own and accordingly I am in possession of it. *On the other hand, if it is lying on a table in a room in which I am but which is also frequently used by other people then the mere fact that I am in physical proximity to it does not give rise to the inference that I intend to deal with it as if it belonged to me*. There must be some evidence that I am doing or having done something with it that shews such an intention. Or it must be clear that the circumstances in which it is found shew such an intention. It may be found in a locked room to which I hold the key or it may be found in a drawer mixed up with my own belongings or it may be found, as occurred in a recent case, in a box under my bed. The possible circumstances cannot be set out exhaustively and it is impossible to lay down any general rule on the point. But there must be something in the evidence to satisfy the Court that the person who is physically in a position to deal with the thing as his own had the intention of doing so. (Emphasis added.)

[27] In *Public Prosecutor v Muhamad Nasir Bin Shaharuddin & Anor* [1994] 2 MLJ 576, possession was discussed in the following manner:

> Possession is not defined in the DDA. However, it is now firmly established that to constitute possession, it is necessary to establish that; (a) the person had knowledge of the drugs; and (b) that the person had some form of control or custody of the drugs. To prove either of these two requirements, the prosecution may either adduce direct evidence or it may rely on the relevant presumptions under s 37 of the DDA.

[28] In *Public Prosecutor v Abdul Rahman bin Akif* [2007] 5 MLJ 1, the court after quoting what Thompson J had said in *Chan Pean Leon v Public Prosecutor* held further as follows:

> It is trite that what constitutes 'possession' under s 37 of the Act is a question of law

(see *Yee Ya Mang v Public Prosecutor* [1972] 1 MLJ 120 and *Public Prosecutor v Badrulsham bin Baharom* [1988] 2 MLJ 585). It is however a question of fact whether in a given case a person can be said to be in possession of something.

[29] The evidence adduced by the prosecution show that the police had to cut open the padlock to the front gate in order to enter. Upon entry they conducted a search on one Tan Hock Lye who was found in the compound of the house and discovered on him dangerous drugs which constituted a separate charge against him unconnected with the present case. After questioning him, the police discovered that he did not have the keys to the padlock to the gate at the door of the house. The police then cut open the padlock and gained entry. The circumstances under which the police gained entry according to the prosecution narrative was obviously adduced in order to suggest forced entry into the premises. That said, the evidence also revealed that no keys to the padlocks were found or produced. The police report lodged in respect of the raid were also strangely silent as to the fact of forced entry. No photographs were also produced to show any evidence of forced entry into the premises.

[30] Upon entry into the premises, the police found the accused lying down on a bed situated in the room. The door to this room was not locked. A bodily search conducted on the accused revealed nothing incriminating. A search was conducted in the room and drugs were found in the hollow of the dressing room chair 'kerusi meja solek'. The drugs were not visible to anyone who had entered in the room. According to evidence led by the prosecution, upon the recovery of the drugs and upon his arrest, the accused's reaction was worried, 'cemas' and restless, 'gelisah'. A search conducted in the room also revealed a passport in the name of the accused, a CIMB and Bank of Commerce bankbook in the accused's name. This about sums up the evidence available at the end of the prosecution case.

[31] As gathered from the authorities earlier cited in respect of proof of possession, knowledge is an essential ingredient. In most circumstances, as it is in this case, knowledge has to be inferred as there is seldom if ever direct evidence of knowledge. The prosecution submitted that the element of forced entry showed that the accused had access and control over the drugs recovered. The evidence also revealed that the drugs were recovered in the dressing table chair from the very room where the accused was found lying down. In further support, they submitted that the recovery of the wedding photograph of the accused and his wife afforded proof that the accused was occupying the room. The discovery of the accused's passport and bank books afford further evidence that the accused was occupying the room. They also said that at the time of the raid no one else was in the house except the accused. However, investigations conducted revealed that there were three people staying in the house, the accused, his wife and his daughter.

[32] While the above evidence may point to the fact that the accused may have been occupying the room, can it be said that he had the requisite knowledge of the impugned drugs in order to fasten possession upon him? The drugs were found in the hollow of the dressing table chair and therefore it was not visible to anyone who was in the room. Although clothing was seized from the room, no clothes fitting exercise was carried out to see if it fitted the accused. Also as stated earlier, no keys to the padlock were found on the accused. For that matter no keys to the room were recovered. The production of the wedding photograph was obviously to show that the accused was occupying the room with his wife. However, no documentary or oral evidence was adduced to show who was the registered owner of the house neither was there any evidence produced to show who was the tenant or subtenant, if any. The prosecution did however produce an electricity bill for the premises in the name of Lim Cheng Hong, the wife of the accused. Investigations also revealed that the accused's wife and daughter occupied the premises.

[33] The prosecution as earlier stated had adduced evidence that upon the recovery of the drugs and upon his arrest, the accused's reaction was worried, 'cemas' and restless, 'gelisah'. They accordingly submitted that such reaction is admissible and relevant under the provisions of ss 8 and 9 of the Evidence Act 1950 ('the EA') in order to prove knowledge on the part of the accused.

The reaction of the accused

[34] Section 8 of the EA reads as follows:

> 8 Motive, preparation and previous or subsequent conduct
>
> (1) Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.
>
> (2) The conduct of any party, or of any agent to any party, to any suit or proceeding in reference to that suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant if the conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.

[35] Section 9 of the EA reads:

> 9 Facts necessary to explain or introduce relevant facts
>
> Facts necessary to explain or introduce a fact in issue or relevant fact, or which support or rebut an inference suggested by a fact in issue or relevant fact, or which establish the identity of anything or person whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact happened or which show the relation of parties by whom any such fact was transacted, are relevant so far as they are necessary for that purpose.

[36] Under s 8 the conduct of an accused, for example, absconding, nervousness, restlessness and other like behaviour is admissible as a relevant fact. Under s 9, facts which support or rebut an inference suggested by such conduct is relevant. The case frequently relied upon as authority for the admission of reaction or conduct of an accused is the Federal Court case of *Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19 where it was held as follows:

> The law relating to evidence of conduct is thus patent. If there is no evidence to show that the conduct is influenced by any fact in issue or relevant fact as required by s 8 then it is not admissible as it would then be an equivocal act justifying inferences favourable to the accused being drawn. If it satisfies the requirement of s 8 it is admissible. It must be observed that the degree of proof required to establish evidence of conduct would depend on the nature of the conduct. *Conduct like the flight of an accused is a more positive act and is easily established. On the other hand conduct like the accused looking stunned, nervous, scared or frightened is very often a matter of perception and more detailed evidence may be required.* (Emphasis added.)

[37] Following from the above guidelines, the evidence that the accused was worried 'cemas' and restless, 'gelisah' is conduct of an equivocal nature at best. Any reasonable person upon realising that incriminating evidence or objects were discovered are naturally inclined to display similar reaction what more when his arrest immediately followed such discovery. The reaction displayed by the accused is equally consistent with that of a person who had just discovered that incriminating articles were present in the very room he was found in. I therefore find that it is in all the circumstances of this case it is unsafe to conclude that such reaction constitutes evidence of knowledge on the part of the accused that there were drugs in the dressing table chair.

Exclusivity of possession

[38] The prosecution in their submissions referred to the oft-quoted case of *Public Prosecutor v Denish a/l Madhavan* [2009] 2 MLJ 194 as authority for the proposition that possession need not be exclusive. The source for this belief is derived from a passage in the case by Abdul Aziz Mohamad FCJ where His Lordship held as follows:

> [16] Before proceeding to consider the reasons for the Court of Appeal's decision, we will say a few words about 'exclusive' possession. It is inappropriate to speak of possession of an article in criminal law as exclusive possession. One is either in possession or not in possession, although one could be in possession jointly with another or others. To say that the prosecution of a drug case fails because there has been no proof of exclusive possession is apt to convey the wrong impression that it is only in cases where possession is entirely with one person, – that is, 'exclusive' – that a conviction is possible. When the learned trial judge said 'The accused sought to negative the proof of exclusive possession …', we take it that he meant no more than that the respondent sought to show that he was not in possession of the drugs

because he had no knowledge of their existence and that the drugs could have been placed in his bags by some other person or persons.

A careful reading of the above passage would indicate that what is intended to be conveyed is that possession need not be exclusive to the accused and that it can be joint as well.

[39] The learned judge however goes further to explain as follows:

> [17] The idea of exclusivity features in the meaning of 'possession' in criminal law as one of the elements necessary to constitute possession. As Taylor J said in *Leow Nghee Lim v Reg* [1956] 1 MLJ 28:
>
> ... It is often said that 'possession must be exclusive'. This is ambiguous. Possession need not be exclusive to the accused. Two or more persons may be in joint possession of chattels, whether innocent or contraband. The exclusive element of possession means that the possessor or possessors have the power to exclude other persons from enjoyment of the property.
>
> Custody likewise may be sole or joint and it has the same element of excluding others. The main distinction between custody and possession is that a custodian has not the power of disposal. The statement that 'possession must be exclusive' is often due to confusion of the fact to be proved with the evidence by which it is to be proved. It is essential to keep this distinction clearly in mind, especially when applying presumptions
>
> [18] Thomson J in *Chan Pean Leon v Public Prosecutor* [1956] 1 MLJ 237, said that 'possession' for the purposes of criminal law involves possession itself – which some authorities term 'custody' or 'control' – and knowledge of the nature of the thing possessed. As to possession itself he cited the following definition in *Stephen's Digest* (9th Ed), at p 304, in which the exclusive element mentioned by Taylor J appears:
>
> *A moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need.*
>
> *Once the elements needed to constitute possession are established, including the element of exclusive power to deal, then what is established is possession, not exclusive possession. So much for exclusive possession.* (Emphasis added.)

[40] It is to be noticed from the above passage therefore that what the learned judge had in mind was that it is inappropriate to speak of possession as being exclusive in the sense that it must be established by the prosecution that only the accused must be in possession. This is apt to convey the wrong impression that possession cannot be jointly held. There is nothing however, in the judgment to convey the view that the element of 'exclusivity 'has been done away with. As expressed in the judgment, the element of exclusivity that has to be proven is the power of disposal or the power to deal with it to the exclusion of others. I am fortified in expressing my view above by the exhaustive

treatment on this subject by En Hisyam Abdullah alias Teh Poh Teik in his book 'Drugs Trafficking And The Law'. The learned author has set out to explain with brevity and clarity the elements that go to make up criminal possession and have resorted in his endeavour to draw from principles enunciated from the most recent decisions.

[41] In fact in *Denish Madhavan* itself, as observed by the learned author, the Federal Court found such exclusivity on the facts of the case itself from the following:

(a) that the accused was the tenant of the premises;

(b) the clear confession by the accused that there were more cannabis under the bed; and

(c) the act of the accused in taking out three bags of cannabis form under the bed.

[42] These factors are noticeably absent in this case. A recent decision of the Federal Court adopted a very similar approach to *Denish Madhavan*. The Federal Court case of *Siew Yoke Keong v Public Prosecutor* [2013] 3 MLJ 630 held, inter alia, the following:

> [35] So, in our judgment in the circumstances of this case, the presence of the ladies clothing (two female upper garments and two pairs of female jeans) along with male clothing in the third room of the first house does not mean that no possession was established against Siew. *The crucial question is whether Siew was so situated with respect to the proscribed drugs found in the second and third rooms of the first house that he had the power to deal with the drugs as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need*. In other words, Siew must be so situated that he can deal with the proscribed drugs as if it belonged to him, and it must be shown that he had the intention of dealing with it as if it belonged to him should he see any occasion to do so (he had animus possidendi). Invariably this is a fact which can only be proved by inference from surrounding circumstances of this case. *It must be clear from the circumstances in which the proscribed drugs were found, that Siew had the intention of dealing with the drugs as if they belonged to him*. The list of such possible circumstances is not exhaustive. One example of such circumstances given by Thompson J in *Chan Pean Leon* is a case where an article is found in a locked room where one holds the key. In the present case, Siew was in possession of the keys to the locked first house in which large amount of dangerous drugs were found in two locked rooms; the keys to which were kept at the locations known to Siew. (Emphasis added.)

[43] It will be observed from the decision that an important element considered by the apex court when fastening possession upon the accused is whether in all the circumstances he had the power to deal with the drugs as owner to the exclusion of all other persons should the need arise. He must also be so situated that he can deal with the drugs as if they belonged to him.

[44] On the facts of the case, the court found these factors to be present in the following:

(a) the accused had in his possession the keys to the first house;

(b) he was the tenant of the first house; and

(c) evidence of information leading to discovery under s 27 of the Evidence Act 1950 was admitted by him pointing to sets of keys which led to the discovery of drugs in some of the rooms in the house.

[45] Once again, these factors are absent from the case under consideration. In respect of the element of exclusivity, the court observed as follows:

> The question is what is the combined effect of all the circumstantial which we have set out? Where did the totality and the total effect of all the evidence lead the court to? Did it not lead to the inevitable, and the only conclusion that Siew was found in possession of the proscribed drugs? In our judgment the answer to the above question must be in the affirmative. *Siew was so situated with respect to the proscribed drugs found in the second and the third rooms in the first house that he had the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need (Public Prosecutor v Denish Madhavan and Chan Pean Leon v Public Prosecutor applied). The learned trial judge was right when he held that the prosecution had proved actual possession of the proscribed drugs against Siew*. Having made the affirmative finding of possession, and as the amount of dangerous drugs in this case was more than 15g, the learned trial judge invoked (and in our view rightly) the presumption of trafficking under s 37(da) of the DDA. *In our judgment, the learned trial judge was right in calling upon Siew to enter on this defence on the charge of trafficking against him.* (Emphasis added.)

[46] It will be noted that the court placed emphasis on the need to deal with the proscribed drugs as owner to the exclusion of all others when determining the test of exclusivity. The power of disposal as constituting a necessary ingredient in possession was recently reemphasised in *Law Sie Hoe v Public Prosecutor* [2014] 6 MLJ 714; [2014] 1 LNS 269. In so holding, the Court of Appeal placed reliance on the case of *Toh Ah Loh and Mak Thim v Rex*. The need to exclude others who would have access to the place where the drugs were concealed has been underscored by the decision in *Ibrahim Mohamad & Anor v Public Prosecutor* [2011] MLJU 1491; [2011] 4 CLJ 113 where the Federal Court speaking through Zulkefli Makinudin FCJ (as His Lordship then was) had this to say:

> [9] It is our finding that there is no evidence to prove that both the accused were exclusively in custody and control of the vehicle prior to their arrest. There are so many favourable inferences that can be made from the existing factual matrix of this case. The vehicle could have been previously rented to a third party or Zainuddin could have taken possession of the said vehicle after the summons incident in Kedah.

[47] Although the factual matrix involved a motor vehicle, the position with regard to a house or room is no different. The main thing to note was that the element of exclusivity was considered an essential element in order to prove custody, control and possession as was the need to exclude others to the place where the drugs were found concealed. The need upon the prosecution to exclude others to the drugs was also decisive in the case of *Husin bin Sitorus v Public Prosecutor* [2012] 3 MLJ 782; [2012] 7 CLJ 205 as borne out by the following passage:

> [15] *There is a welter of authoritative precedents which have held that for possession to be established, accessibility by others to the place where the drugs are found should be excluded by evidence by the prosecution* (*Pendakwa Raya v Kang Ho Soh* [1992] 1 MLJ 360; [1991] 3 CLJ 2914; [1991] 3 CLJ (Rep) 557 (HC), *Public Prosecutor v Tang Chew Weng* [1969] 1 LNS 141 (HC). The onus is not on the defence to prove possibility of access by others but on the prosecution to exclude such possibility and the issue must be answered in favour of the appellant if there were more than one way in which the evidence adduced by the prosecution might be viewed such as in the present case, implicating the appellant or the other persons who were present in the boat. (*Abdullah Zawawi Yusoff v Public Prosecutor* [1993] 3 MLJ 1; [1993] 4 CLJ 1 (SC). In other words exclusivity of custody and control of the drugs ought to be established by the prosecution. (Emphasis added.)

[48] The facts in the Court of Appeal case of *Azizan Yahaya v Public Prosecutor* [2013] 1 MLJ 180; [2012] 8 CLJ 405 bear some resemblance to the facts of the instant case as the drugs there were recovered from a room occupied by the appellant and his wife. In considering the element of exclusivity the court held:

> [8] We find from the evidence adduced by the prosecution that though the room where the drugs were found was occupied only by the appellant and SP4 but it is pertinent to note that evidence also showed that the room was accessible to all the other occupants in the house. SP4 testified that she and the appellant occupied the main bedroom and the children occupied the other two rooms. In cross-examination SP4 agreed that everybody in the house had access to the room (p 28 appeal record). The room was unlocked. Thus whilst the occupants of the room were the appellant and SP4 both of whom would have had complete access to the room, it is also apparent that their three children too had access to the room. Yet SP4 was not charged although she was remanded.
>
> [9] We find that the testimony of SP4 regarding access to the room was hardly challenged. SP5 under cross-examination had also agreed that the appellant's children probably had access to the appellant's room. He was not re-examined on this issue. We agreed with learned counsel that the learned judge had failed to analyse or assess these testimonies. *The prosecution has failed to discharge its bounden duty of excluding access to the appellant's room by others.* (Emphasis added.)

[49] The above cases drive home the point that the element of exclusivity and the need to exclude others from access to where the drugs were found is of

paramount importance if the prosecution are to successfully prove custody, control or possession. It is unfortunate that in this case the prosecution were not able to call the wife and daughter of the accused in their attempt to establish the element of exclusivity of the drugs on the part of the accused.

The prosecution's application to invoke s 32(1)(i) Evidence Act 1950

[50] They did however, attempt to admit in evidence the statement of the wife, Lim Cheng Hong and the accused's daughter, Chang Shi Qi. Inspector Suhaimi bin Mat, PW5, upon recall, testified that he recorded the statements of both Lim Cheng Hong and Chang Shi Qi under the provisions of s 112 of the Criminal Procedure Code ('the CPC') and obtained their NRIC. He testified that during the recording of their statements he obtained a telephone number. He testified that when he tried to locate them and upon his visit to the house, he called the said telephone number and could hear the telephone ringing coming from the house but there was no response to his call. He also testified that he also placed advertisements in several newspapers regarding information about the said Lim Cheng Hong and Chang Shi Qi but to no avail. Learned counsel for the accused however, objected when the learned deputy public prosecutor attempted to introduce the statement of Lim Cheng Hong through the provisions of s 32(1)(i) of the Evidence Act 1950. The section reads as follows:

> 32 Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant
>
> (1) Statements, written or verbal, of relevant facts made by a person who is dead or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the court unreasonable, are themselves relevant facts in the following cases:
>
> (i) when the statement was made in the course of, or for the purposes of, an investigation or inquiry into an offence under or by virtue of any written law; and

[51] It has been held that a person whose whereabouts are unknown despite a proper search made is a person who 'cannot be found'. See *Public Prosecutor v Lim Bong Kat & Anor* [1992] 4 CLJ 2173. The application of the section is not automatic and sufficient evidence must be adduced to show that despite all efforts made the person could not be traced. See *DA Duncan v Public Prosecutor* [1980] 2 MLJ 195. The provision in the section was also considered in the case of *Public Prosecutor v Lee Jun Ho & Ors* [2009] 3 MLJ 400 where the level of diligence expected on the part of the prosecution before the section could be invoked was stated in no uncertain terms as follows:

> Section 32 of the Evidence Act 1950 is an exception to the general rule that hearsay evidence is inadmissible. Under s 32(1) of the Act, one of the circumstances under

which such a statement becomes admissible is where the person who made the statement 'cannot be found'. This was the basis upon which the prosecution tried to invoke when they attempted to produce and tender ID66 and ID67. For a witness to be clothed as 'who cannot be found' within the meaning of s 32(1) of the Evidence Act 1950*, such determination is a finding of fact, of which the onus is upon the prosecution to prove.*

From facts adduced, I find that the police has failed to take all reasonably practicable steps to trace the witnesses. In fact there was not a single proactive effort by the police to procure the attendance of such material, relevant and important eye-witnesses.

There was no attempt to fully utilise the prevailing and available provisions of the Criminal Procedure Code, in order to secure the attendance of the witnesses. The police failed to invoke the provisions of Criminal Procedure Code; which empowers the court to issue a warrant in lieu of or in addition to summon a witness and to require that person to execute a bond for his appearance in court. The police also failed to invoke the provisions of s 118(1) of the Criminal Procedure Code whereby the police officer who desires any person, who is acquainted with the circumstances of a case, to be present in court, shall require that person to execute a bond to appear at the trial court. The prosecution also failed to utilise the provisions of s 396 of the Criminal Procedure Code whereby the public prosecutor may apply to court for any witness of any sizeable offence that intends to leave Malaysia and that witness's presence at the trial to give evidence is fatal for the trial, to be committed to the civil prison until trial or until he shall give satisfactory security that he will give evidence at the trial.

... In view of the above circumstances especially of the omissions by the police to take all reasonably practicable steps in tracing the witnesses, and guided by the following cases (on s 32(1) of the Evidence Act):

(i) *Public Prosecutor v Mohamed Said* [1984] 1 MLJ 50;

(ii) *Public Prosecutor v Mohd Jamil bin Yahya & Anor* [1993] 3 MLJ 702; [1994] 1 CLJ 200;

(iii) *Public Prosecutor v Gan Kwong* [1997] MLJU 144; [1997] 2 CLJ Supp 433;

(iv) *Public Prosecutor v Chow Kam Meng* [2001] MLJU 386; [2001] 7 CLJ 387;

(v) *Public Prosecutor v Mogan Ayavoo* [2004] 3 CLJ 623; and

(vi) *Public Prosecutor v Norfaizal bin Mat (No 2)* [2008] 7 MLJ 792.

I hold that the prosecution has failed to meet the requirements and the prerequisites of s 32(1) of the Evidence Act 1950. I accordingly ruled that the statements, ID66 and ID67 are inadmissible, as evidence for the prosecution.

[52] The case makes it clear that the section is an exception to the hearsay rule and that the onus to prove that a person cannot be found lies squarely upon the shoulders of the prosecution. Learned counsel for the defence raised the

following points in support of his submission that the application be disallowed. Firstly, he said that the prosecution only chose to call one witness, namely PW5. Secondly, he submitted that s 118 of the Criminal Procedure Code ('the CPC') had not been complied with. Section 118 reads:

> 118 Police officer may require bond for appearance of complainant and witnesses
>
> (1) If upon a police investigation made under this Chapter it appears to the officer making the investigation that there is sufficient evidence or reasonable ground of suspicion to justify the commencement or continuance of criminal proceedings against any person, the officer shall require the complainant, if any, and so many of the persons who appear to the officer to be acquainted with the circumstances of the case, as he thinks necessary, to execute a bond to appear before a Magistrate's Court therein named and give evidence in the matter of the charge against the accused.
>
> (2) The officer in whose presence the bond is executed shall send it to the Magistrate's Court.
>
> (3) If any complainant or witness refuses to execute the bond, that officer shall report the same to the Magistrate's Court which may then in its discretion issue a warrant or summons to secure the attendance of the complainant or witness before itself to give evidence in the matter of the charge against the accused.

[53] Counsel submits that the record of transfer of the case showed that the accused was arrested on 31 July 2013 and charged on 7 August 2013. According to the testimony given by PW5, the recording of the statements were done on 2 August 2013. Attempts were only made to trace the witnesses in February and March of 2015. Some one and a half years had thus elapsed in the meantime. Counsel therefore submitted that as it must have been apparent from the time their statements were taken that the witnesses were required to give evidence they should have been required to execute a bond pursuant to the provisions of s 118. In fact this was the very observation made by the learned judge in the case of *Public Prosecutor v Lee Jun Ho & Ors* and one of the grounds upon which the court refused to admit a statement under the provisions of s 32(1) of the Evidence Act 1950.

[54] Counsel further submitted that although PW5 had copies of the NRIC of the witnesses, no search was done with the National Registration Department in order to determine whether the addresses were current or not. No checks were made with the immigration department, SOCSO, EPF, the Inland Revenue Department and other relevant government agencies in order to ascertain their whereabouts. The house LAN line telephone number mentioned by PW5 in his testimony was not subject to investigation at Telekoms Bhd in order to determine under whose name it was registered. No attempts were also made to ascertain their mobile phone numbers.

[55] Counsel further submitted that according to the testimony as reflected in PW5's witness statement, upon his visit to the house address at 1060 F Jalan Sultan Azlan Shah, Sungai Nibong 11900 Bayan Lepas, Pulau Pinang there was light emanating from both inside and outside the house and there was a motor vehicle registration number PDU 2311 parked there. Upon further investigation, PW5 testified that the said motor vehicle was registered under the name of Chang Shi Qi. PW5 testified that he made three visits to the said house and on his third visit at around 6pm on 27 February 2015, he found a child approximately 12 years of age playing at the side of the house. Learned counsel submitted that no attempts were made to question the child as to who her parents were and whether she could take PW5 to her parent. Counsel therefore submitted that there was a woeful lack of due diligence on the part of the police in attempting to locate the witnesses. It was only very late in the day that emails were sent by PW5 on 1 March 2015 to the local media to locate these witnesses for the trial on 6 March 2015.

[56] The learned deputy public prosecutor on the other hand, submitted that the recording of the statements took place on 2 August 2013 and 5 August 2013 while the trial commenced on 6 January 2013. The intervening period of one and a half years is not an inordinately long time. SP5 had taken all reasonable steps by going to the house in the morning and on the evening and knocking on the door but to no avail. It was submitted that both the witnesses were still there and were evading detection by the police. Subpoenas were then placed outside the house.

[57] The submission of the learned deputy public prosecutor that it was evident that the witnesses were still staying at the premises itself militates against their arguments that all reasonable steps were taken. This was not a case where the witnesses had mysteriously gone missing and were no longer present so that there existed slim or no hope of them ever being traced. Given that the witnesses seemed to be still residing at the premises, more diligent efforts on the part of the police would have no doubt produced some results. The occupiers would have had to come out from the premises at some time or another whether it be to attend their place of work or to obtain groceries for the household. Round the clock surveillance for a number of days would no doubt have revealed results. If these witnesses were important to the prosecution, at the very least they could have required to execute a bond pursuant to the provisions of s 118 of the CPC. I find that there was a lack of due diligence in attempts to pursue these witnesses in order to secure their attendance in court. The efforts made at the eleventh hour by PW5 in advertising in the press and in visiting the premises had come a little too late in the day. In the circumstances, I disallowed the application by the prosecution to adduce the statements of both Lim Cheng Hong and Chang Shi Qi under the provisions of s 32(1)(i) of the Evidence Act 1950.

A Findings in respect of possession

[58] As alluded to above, exclusivity still constitutes a necessary element before it can be proven that possession is established. So is the need to prove power of disposal or the power to deal to the exclusion of others. The evidence shows that there were at least two others occupying the room, namely, the wife and daughter of the accused. No evidence was forthcoming from them as they were not able to be located and the application to admit their statements were refused for the reasons given above. Although the prosecution led evidence of forced entry, no photographs were produced of the inner gate grill to evidence such forced entry. The police report lodged by the head of the raiding party also omitted to mention that there was forced entry into the inner gate grill. SP5 candidly admitted under cross-examination that there was no documentary evidence to show forced entry. No keys to the padlocks said to be cut to gain entry were found on the accused or in the house. However, PW5 under cross-examination agreed that both Lim Cheng Hong and Chang Shi Qi had the keys to the premises including the outside and inner gate grill.

[59] The defence put by way of cross-examination to PW5 that Tan Hock Lye, who was arrested in the compound of the house also had access to the house. To this suggestion, PW5 replied that he was not sure. PW5 also agreed to the suggestion of learned counsel that the house was utilised for business rearing of Koi fish. PW5 agreed further that no investigations were carried out to ascertain the existence of receipts evidencing the purchase of fish, fish food and equipment pertaining thereto. To a suggestion put forth by learned counsel that as there was no investigation of the receipts evidencing purchases relating to the fish rearing business, it could well be that the fish rearing business was carried out by one Lau Chin Aik assisted by Tan Hock Lye, PW5 answered that he was unsure. He also testified that he was unsure if the said Lau Chin Aik also had access to the house. Lau Chin Aik's NRIC was tendered in evidence as a defence exhibit. Counsel for the defence submitted that the possibility that both the said Lau Chin Aik and Tan Hock Lye had access to the house was never negated by the prosecution.

[60] In the Federal Court case of *Gooi Loo Seng v Public Prosecutor* [1993] 2 MLJ 137, It was held that even if the appellant had known of the presence of the drugs (heroin) in his bedroom, that by itself would not have been sufficient to establish that he was in possession or in control of it given the fact that others too, including the appellant's girlfriend, had access to the bedroom and could have concealed the heroin there. The court held that this was a case of the proverbial cap which might have fitted to just the head of the appellant but that of others as well.

[61] In a similar vein, even if the accused here had known of the presence of the drugs in the hollow of the dressing table chair, this would have been insufficient to establish that he was in possession or in control of it, given that the wife, Lim Cheng Hong and the daughter, Chang Shi Qi also had unrestricted access to the room. The possibility that either one of them had concealed the drugs there cannot be excluded. The prosecution has therefore failed to prove that there was exclusivity of possession on the part of the accused and that he had power of disposal over the impugned drugs to the exclusion of others.

[62] It is not in dispute that the raid on the house was pursuant to information received. In respect of the police raiding party acting on a tip-off leading to the arrest of the accused, it was held in the case of *Abdullah Zawawi bin Yusoff v Public Prosecutor* [1993] 3 MLJ 1; [1993] 4 CLJ 1 that in order to implicate the accused there is a need for the prosecution to exclude the possibilities that other individuals may have access to the drugs in question. On the evidence, the prosecution has failed in this respect.

[63] The prosecution also had failed to adduce any fingerprint evidence or DNA evidence to link the accused to the drugs. There was also no documentary evidence adduced linking the accused to the house, for example, tenancy agreements, title documents, utility bills and assessment payment receipts. It also bears repetition that the drugs were concealed away from the gaze of anyone in the room.

[64] In respect of the mere proximity of the accused to the drugs, the case of *Public Prosecutor v Lin Lian Chen* [1992] 2 MLJ 561 held as follows:

> We consider that it would not be an unfair summary of the case for the prosecution against the respondent, on the question whether it was proved that he was in custody or control of the seven packages or the cigarette packet, containing the offending exhibits, *if we said that the evidence against him in relation thereto was, essentially, of juxtaposition. It goes without saying that such evidence, which amounts to nothing more than grave suspicion, is totally inadequate for purposes of inferring control or even custody of the containers concerned sufficient to attract the presumption under* s 37(d). Accordingly, on this ground alone, the learned judge was perfectly entitled to rule, at the close of the case for the prosecution, that the respondent had no case to answer and to acquit and discharge him. (Emphasis added.)

[65] In *Romi Amora bin Amir v Public Prosecutor* [2011] 4 MLJ 571 the court said:

> Unless knowledge is proved, an item however close to a person, could just be miles away.

[66] It is therefore clear that mere proximity or juxtaposition of the accused

to the drugs without more is insufficient to fasten possession upon the accused. In the circumstances, I find that the prosecution has failed to prove that the accused had knowledge of the drugs found in the room and has failed to prove that the accused was in possession of the said drugs.

The accused was trafficking in the dangerous drugs

[67] In respect of trafficking the prosecution placed reliance upon the statutory presumption under s 37(da)(xvi) of the DDA, the relevant part of which reads as follows:

> 37 Presumptions
>
> In all proceedings under this Act or any regulation made thereunder–
>
> (da) any person who is found in possession of–
>
> (xvi) 50 grammes or more in weight of Methamphetamine; otherwise than in accordance with the authority of this Act or any other written law, shall be presumed, until the contrary is proved, to be trafficking in the said drug.

[68] As the accused was arrested on 31 July 2013, the amendment in s 37A has no application with the result that the rule against the invocation of double presumptions still apply. See *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273, where the Federal Court also held:

> Furthermore, the basic or primary facts needed to raise 'deemed' possession and 'deemed' knowledge under s 37(d) of the Act and those required to raise 'presumed ... trafficking' under s 37(da) are different. To come to the presumptions of possession and knowledge under s 37(d), one need only to arrive at a finding of having had 'in custody or under ... control anything whatsoever containing' the drug (as opposed to the drug itself) whereas *to arrive at the presumption of 'trafficking' under* s 37(da), *a finding of being 'in possession' of the drug is necessary* (in addition, of course, proof of the relevant minimum quantity specified). (Emphasis added.)

[69] In order therefore for the prosecution to invoke the presumption under s 37(da) of the DDA, an affirmative finding of possession must first have been made out. As this has not been the case here as evident from what was earlier held, I hold that the prosecution has thus failed to successfully rely upon the statutory presumption in s 37(da) of the DDA.

[70] I find that upon a maximum evaluation of all the available evidence and following the test enunciated in *Looi Kow Chai & Anor v Public Prosecutor*, were I to call for the defence of the accused, and should he elect to remain silent, I am not prepared to convict him on the charges.

[71] I therefore find that the prosecution has failed to establish a prima facie case in respect of both charges against the accused. I therefore acquit and discharge the accused without calling for his defence on both the charges.

Accused acquitted and discharged without calling for his defence on both charges.

Reported by Afiq Mohamad Noor